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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

JAMES R. SWEETSER and DELORES G. SWEETSER,
husband and wife,

Respondents/Cross-Appellants,

v.

BLACK COMMERCIAL, INC. d/b/a NAI Black, f/k/a TOMLINSON
BLACK COMMERCIAL, INC., a Washington Corporation; DAVID R.
BLACK, its designated broker and chief executive officer, an unmarried
person; JEFF K. JOHNSON, its managing associate broker, JANE DOE
JOHNSON, and their marital community; EARL ENGLE, its agent;
JANE DOE ENGLE, and their marital community; ANNE BETOW, its
agent, JOHN DOE BETOW, and their marital community; MARK
McLEES, its agent, JANE DOE McLEES, and their marital community;
JEFF McGOUGAN, its agent, JANE DOE McGOUGAN, and their
marital community,

Appellants/Cross-Respondents.

Appellants/Cross-Respondents' Reply Brief in Support of Appeal and
Response Brief in Opposition to Cross-Appeal

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I. RESPONSE TO SWEETSERS' INTRODUCTION.

Respondents/Cross-Appellants ("Sweetsers") presented an argumentative description of the case containing allegations largely unrelated to either appeal. The facts of the case show that on October 19, 2006, the subject property ("Property") came on the market and Sweetsers made a full price offer through Appellants/Cross-Respondents (collectively "Brokers"). By the end of the following day, two additional offers had been submitted and the seller ("Sebco") had entered a Purchase and Sale Agreement ("PSA") with one of the other offerors, Copeland Architecture & Construction ("Copeland"). Copeland's offer was superior, it was for more money, with fewer contingencies and a shorter closing time.

When he made his initial offer, Mr. Sweetser knew properties of this type were in high demand, another realtor had shown the Property before he saw it, his agent, Anne Betow, had advised him to offer more than the listed price, that Ms. Betow thought the Property was a "steal" at the listed price, and that the Property could sell for more than the listed price. Mr. Sweetser was unwilling to offer more than listed price.

It was only after Mr. Sweetser learned that Sebco was not going to counter his offer or engage in any type of bidding process that Sweetsers

made a series of increasingly better offers. By that time, Sebco had made its decision to deal only with Copeland, and by the time Sweetsers made their third offer, the Sebco/Copeland PSA had been mutually accepted.

After Copeland completed their purchase, they began remodeling the Property and intended to occupy part of it for their own offices and lease the rest. Mr. Sweetser badly wanted the Property. To acquire the Property, Sweetsers had to agree to a price at which Copeland, who had no desire to sell the Property, would be willing to part with it. The reason Mr. Sweetser did so was explained in the carryover paragraph on page 10 of Sweetsers' brief; the Property was "his dream office."

II. BRIEF RESPONSES TO SWEETSERS' ASSIGNMENTS OF ERROR ON CROSS-APPEAL.

1. Response to Assignment of Error No. 1.

Sweetsers claim the jury verdict was a compromise verdict. Sweetsers never raised this issue in the trial court, or requested a new trial or vacation of the jury's decision.

2. Response to Assignment of Error No. 2.

Sweetsers contend they did not receive a fair trial due to juror bias and juror nullification. Sweetsers did not present any such argument in

the trial court at any time during or after the trial, and the alleged bias does not meet any of the criteria in CR 59.

3. Response to Assignment of Error Nos. 3 and 4.

Sweetsers contend the trial court erred in giving Jury Instruction Nos. 11 and 12 dealing with the date on which the Sebco/Copeland PSA was mutually accepted and the impact of a right of first refusal in a lease at the Property between Sebco and the Property's tenant, First American Title ("First American"). The instructions were correct statements of the law and were made necessary by Sweetsers' misrepresentations of the law in opening argument and in trial testimony. Additionally, the bases for Sweetsers' objections on appeal were not presented to the trial court.

4. Response to Assignment of Error No. 5.

Sweetsers contend the trial court erred in imposing a time limit on the trial. The timeline for the trial was set at eight days and the parties had estimated in their Trial Management Joint Report that the trial would take 11 days. No party objected to the shortened time and the court reasonably exercised its discretion in allocating the trial time.

5. Response to Assignment of Error No. 6.

Sweetsers contend the trial court erred in excluding Exhibits 129, 130, 133 and 149. The trial court exercised discretion in disallowing

admission of improperly authenticated and cumulative evidence that did not pertain to the Property, was not discussed in trial, and showed no similarity to the transaction at issue.

6. Response to Assignment of Error No. 7.

Sweetsers contend the judgment was entered in error based on all of the issues presented above. Sweetsers presented no such arguments at the time of presentment of the judgment, did not object to entry of the judgment on any of those bases, did not request a new trial and did not address this "catch-all" assignment in their brief.

III. RESPONSE TO SWEETSER'S STATEMENT OF THE CASE.

Sweetsers' Statement of the Case was incomplete and at times misleading, often lacked citations to the record, and was largely comprised of argumentative assertions that are not relevant to the issues on appeal.

For example, Sweetsers contended Mr. McLees and Mr. Black "were discussing a game plan for the north periphery of Spokane where the property is located" citing Exhibit 15 and RP 259:23-25. That email did not relate to the Property, pertained to efforts to procure a property for U. S. Bank and not the Brokers, was intended as an inside joke in response to Sweetsers' lawsuit, and was sent on November 15, 2006 (20 days after

the Sebco/Copeland PSA was mutually accepted and 9 days after Sweetsers had initiated this suit) (CP 1 and 12; RP 188:2 – 189:25). If taken literally, the email related to a plan they were going to try to put together, not one that existed when Sweetsers tried to buy the Property.

On page 7, Sweetsers admitted they engaged Brokers to help them buy a commercial building, but claim there was never any buyer-broker agreement akin to a listing agreement. Sweetsers ignore that, in addition to the contractual relationship they entered for the provision of services, Brokers prepared and submitted multiple PSAs on Sweetsers' behalf that Mr. Sweetser voluntarily signed. At the time he was signing those PSAs, Mr. Sweetser believed he created a binding contract he could specifically enforce (RP Corbey 37:2-7; 42:13-16). In this litigation, Sweetsers' claims focused on how Sweetsers' PSAs were handled (RP 1270:5-11). Nothing in any of the PSAs states that Sebco's acceptance was a necessary condition to causing the attorney fee provisions in the PSAs to become effective as between Sweetsers and Brokers. The applicable clause states

If Purchaser ... or any Agent or Broker involved in this transaction is involved in any dispute relating to any aspect of this transaction or this Agreement, any prevailing party shall recover their reasonable attorneys' fees and costs.

[Emphasis supplied.] (Paragraph 14.f. in Exhibits 33, 46-53, and 1017.)

On page 7, Sweetsers contended Copeland had been in the market to lease office space for its offices. In fact, Copeland had also been searching for property to purchase and, before finding the Property, had formed a limited liability company, Day Three, L.L.C., for the purposes of purchasing property if they found one that was suitable (RP 513:5-23). A review of Day Three's Certificate of Formation shows it was formed in July 2006, months before the Property came on the market in October 2006 (Exhibit 80).

In the carryover paragraph on page 8, Sweetsers claimed "there was apparently no urgency to sell the Property, as Sebco did not have to sell it." In fact, Sebco was interested in selling the Property as quickly as possible as it was involved in a time-sensitive and potentially costly reverse 1031 exchange (CP 81-83; 845-848).

In the first full paragraph on page 8, Sweetsers noted that Mr. Sweetser saw the Property and made an immediate full price offer to buy it. Sweetsers did not disclose that when Mr. Sweetser came to the Property, he was advised by his agent, Ms. Betow, another agent had shown the Property before he got there, at the listed price she thought the Property was a steal, she hoped this was not one of those properties that sold at above the listed price, and she recommended that he offer more

than the listed price (RP Corbey 34:8-15; 135:6 – 136:17; 146:1-24; RP 461:16-20). Despite this information, Mr. Sweetser was unwilling to offer more than full price (RP 456:2 – 457:4).

In the bottom paragraph on page 8, Sweetzers contended that when Mr. Sweetser was advised he was not the only offeror he sought advice from Ms. Betow and was told to do nothing. In fact, her response came after her initial advice to Mr. Sweetser in which he refused to offer more than the list price and an email he sent to her stating in part "I haven't told my wife yet and could engage in bidding without her approval" and "If we lose it, we lose it" (RP 463:24 – 464:15).

In their final paragraph on page 9 and carrying over to page 10, Sweetzers contended Jeff Johnson gave them a "rather flippant response" when Mr. Sweetser was attempting to find answers. By that point in time, the Sebco/Copeland PSA was mutually accepted and Jeff Johnson, as Managing Broker, was a dual agent for the transaction. He was statutorily forbidden under RCW 18.86.060(2)(a) from taking any action that would be adverse or detrimental to either of those parties' interests.

On page 9, Sweetzers suggested that after Copeland completed purchase of the Property and Mr. Sweetser made an immediate offer to lease the Property, the Property was promptly taken off the market. The

decision to take the Property off the market at that point was made by Copeland (Exhibit 66). The prospect of leasing to Mr. Sweetser made Copeland very nervous and uncomfortable (RP 514:23 – 515:14). By that time, Mr. Sweetser had instituted this litigation (CP 1), and had brought a motion in court to attempt to set aside the Sebco to Day Three property sale and force Day Three to engage in some type of bidding process with him (CP 89–91).

Beginning with the first full paragraph on page 10 of their brief and continuing through the end of their Section III, Sweetser's summarized "Sweetser's findings." Those findings are largely devoid of citations to the record, do not evidence wrongdoing, and do not pertain to issues raised in these appeals.

IV. RESPONSE TO SUMMARY OF PROCEEDINGS BELOW.

Beginning on page 13, Sweetser's presented an incomplete and slanted summary of the proceedings below.

Sweetser first contended that, from the outset of this litigation, they only made statutory and common law claims. Before the litigation, Sweetser's engaged Brokers to provide brokerage services on their behalf and Brokers did so. Mr. Sweetser voluntarily signed multiple PSAs and

requested that the Brokers represent him and present them. As noted on page 5 above, when Mr. Sweetser signed those PSAs, he intended and believed he had created a binding contract with Sebco that could be specifically enforced; and Sweetser's suit was based almost entirely on allegations that Brokers breached duties in their handling of Sweetser's PSAs.

Sweetser incorrectly asserted that no party in the case sought to enforce any contract between the parties. In their Answer, Defendants requested attorney fees under the PSAs Mr. Sweetser voluntarily signed and submitted (CP 169.)

Sweetser contended they voluntarily dismissed Criminal Profiteering claims and certain Defendants without prejudice "due to lack of necessary discovery allowed by the trial court." There is no support for that assertion in their brief or in the record.

In the final paragraph on page 13, carrying over to page 14, Sweetser discussed the timeline for the trial. The trial court allowed 8 days based on the time available, when the parties had agreed that the entire case should take approximately 11 trial days (CP 477). Sweetser claim at the bottom of page 14 that they altered their trial plans and

submitted revised witness lists citing CP 469–471. Those portions of the record have nothing to do with the argument presented.

Similarly, Sweetsers contended that they pled with the court to allow sufficient time to present their case, citing CP 471. That is a proposed jury instruction having nothing to do with the argument presented.

In the middle of the first full paragraph on page 15, Sweetsers acknowledged that they ran out of time at noon on Monday, June 1 and rested, citing RP 691:22 – 692:3. They had known the timeline from the outset and, when their time was up, did not object, either in the presence of the jury or otherwise. Sweetsers also contended that exhibits needed to be discussed before being allowed to go to the jury room citing RP 936:17-20. That portion of the record contains only statements made by Mr. Lam regarding what he needed to do, not any objection or any trial court ruling.

Sweetsers then contended that they requested more time to reopen their case. What the trial court recognized in connection with that request was that the proffered evidence did not relate to the transaction at issue and were not tied to the transaction at issue with any explanation of commonality or relevance (RP 938:18 – 940:10).

In the first full paragraph on page 16, Sweetsers claimed the trial court gave erroneous Jury Instructions numbered 11 and 12. In support of this argument, Sweetsers referred to the exhibits and RP 1000:15 – 1001:14. That portion of the record contains no objection or argument from Sweetsers regarding the propriety of the exhibits. Sweetsers also relied on RP 1004:4 – 1017:8. In those portions of the record, Sweetsers' counsel made no suggestion that the ruling in *Old National Bank of Washington v. Arneson*, 54 Wn.App 717, 721-22, 776 P.2d 145 (1989) had been or should be overruled. Instead, he suggested that the language in the lease somehow supplanted the Supreme Court's decision.

With regard to Exhibit No. 12, the trial court's discussion and Sweetsers' objections began at RP 1012. In that portion of the record, Sweetsers' counsel stated at RP 1013 beginning at line 5

Yes, your Honor. The first part of it is fine with us. That is what the law is, obviously. But the second part, it's very problematic. I think that is an application as a matter of law and stated this is a finding in this case, and that is not true. Because in this case, there is no - - nothing in the contract that says it's not assignable. The *Old National Bank* case, it doesn't say that it's not assignable or transferable ...

In the balance of his argument, Sweetsers' counsel relied upon *Old National Bank* as good authority for their objection.

On page 16 of their brief, Sweetsers contended "the jury found TBC liable under the statute and common law" citing CP 412, 414. In fact, the jury did not find all elements present to establish liability as against any Defendant, since no Defendants' conduct was found to have proximately caused any injury or damages (CP 412–416.)

Beginning at the bottom of page 16, Sweetsers contended that "it turned out that the verdict was not the result of jury deliberation, but a compromise by the jurors ..." In support, Sweetsers cited three declarations they placed in the record at CP 706–711. A review of those declarations shows they were filed August 11, August 13 and August 14, 2009, respectively. They were offered at the time of presentment of the judgment on the verdict on August 14, 2009 (RP 1253 – 1255.) The trial court struck the jurors' statements saying "Then I also received these affidavits and declarations from jurors. These I will strike. Neither are they timely nor are they appropriate. What happens in the jury room adheres [sic] in the verdict. Soliciting of individual jurors to complete affidavits and declarations other than on - - it is not relevant for what I have to do in terms of what is before the court. I am not going to consider them." (RP 1255:23 – 1256:5). There was no motion for a new trial, no allegation of juror misconduct, no allegation that there was a compromise

verdict, and the affidavits were untimely offered in conjunction with the motions before the trial court.

On page 17 of their brief, Sweetzers incorrectly summarized Brokers' bases for requesting attorney fees under the parties' contract. Brokers have argued the parties had a contract based on the services that were provided. Brokers have further argued that the attorney fee clauses in the multiple PSAs Mr. Sweetser voluntarily signed and had Brokers present, and which Brokers did help draft and present as Sweetzers' agents, applied and became part of that contract. Sweetzers took the position below in this appeal that the parties had no contract, that Sweetzers only engaged the Brokers to provide them with real estate services. Sweetzers also argued that an unaccepted offer cannot become part of a contract between a prospective purchaser and the brokers representing that purchaser since Sweetzers and Brokers have found no case with similar facts. In this regard, Sweetzers confused the absence of appellate decision with a substantially identical fact pattern with a contention that the law therefore supports their position.

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V. REPLY TO ARGUMENT ON BROKERS' APPEAL.

A. Reply regarding Standard of Review.

Sweetsers contended that the trial court determined there was no contract between Brokers and Sweetsers and that the determination involved both questions of fact and law. There was no dispute regarding the facts. Sweetsers engaged Brokers to provide brokerage services. The trial court recognized that this created a relationship "and you could call it an oral contract" (RP 1279:13-16). Sweetsers voluntarily signed multiple PSAs that included attorney fee provisions. The clauses provided they would apply in any dispute regarding any aspect of the PSAs (with no requirement in the PSAs that they be accepted by the seller in order to become applicable for this purpose) or the transaction (with no requirement that a transaction close or that a PSA be accepted by Sebco in order for a transaction to exist). The trial court recognized that the attorney fee clauses were "very broad" (RP 1280:3-7).

In support of their position, Sweetsers contend this court should give deference to the trial court's factual findings, when no factual findings were entered. The trial court simply entered an order denying Brokers' request (CP 417-18.) Sweetsers' reliance on *In Re: Pennington*, 142 Wn.2d 592, 14 P.3d 764 (2000) (where the court made factual

findings), is not relevant in deciding the issues presently before this Court. Here, there was no dispute regarding the essential facts. Likewise, Sweetsers' reliance upon *Nakata v. Blue Bird, Inc.*, 146 Wn.App 267, 191 P.3d 900 (2008), in which the trial court exercised discretion in deciding whether to award attorney fees under a statute giving the court discretionary authority whether to award attorney fees is not relevant here.

An appellate court determines whether a contract provides for an award of attorney fees as a matter of law and appellate review of the issue is de novo. *Boguch v. Landover Corp.*, 153 Wn.App 595, 615, 224 P.3d 795 (2009).

B. The trial court erroneously determined there was no contract.

At page 18 of their brief, Sweetsers acknowledged that the trial court agreed "Sweetser's [sic] relationship with [Brokers] was one of securing services akin to hiring a plumber or electrician, that the court recognized there was a form of oral contract and that the case was factually different from cases cited by either side." What Sweetsers failed to recognize was that when Sweetsers engaged Brokers to provide brokerage services, the parties formed a contract.

This result is implicit in the statement in *Jackowski v. Borchelt*, 151 Wn.App 1, 14, 209 P.3d 514 (2009) that "Neither do we believe that the economic loss rule ... abrogates all professional malpractice claims, particularly where a client hires a professional and, therefore, establishes a privity of contract with that professional." The court was specifically referring to the relationship created between a real estate agent and prospective property purchaser. Nothing in the case suggested there was a buyer representation agreement or any similar document stating any terms for a contract.

Similarly, in *Boguch v. Landover Corp*, 153 Wn.App 595, 616-617, 224 P.3d 795 (2009) (the case Sweetsers identified at page 19 of their brief as "Recent Binding Authority"), the Court of Appeals analogized the relationship between a real estate broker and a client to legal malpractice or medical malpractice claims. The court stated "if an attorney agrees to draft a will for a client and fails to do so, the client would be able to claim breach of contract and recover under an applicable contractual fee provision." The court did not state existence of a written agreement was necessary to create a contract. It recognized, however, that an applicable contractual fee provision would be necessary.

In this case, Sweetsers requested and Brokers agreed to and did undertake to provide Sweetsers with brokerage service, thereby establishing a contract. The PSAs, that Mr. Sweetser thought created a binding contract with Sebco, and out of which Sweetsers' claims arose, contained the bilateral attorney fee clause Brokers now seek to enforce.

C. The PSAs were part of the parties' contract.

The proper focus is not on whether Brokers and Sweetsers entered a contract. As stated above and in Brokers' opening brief, case law and general principals regarding creation of contracts demonstrates they clearly did. The proper question is whether the PSAs, having been provided, prepared, presented and represented on behalf of Sweetsers by Brokers, and having been voluntarily signed and entrusted to Brokers by Sweetsers, became part of the parties' contract for purposes of the attorney fee provisions. It is with respect to this part of Brokers' argument that the trial court recognized neither side had found a reported decision with analogous facts.

Sweetsers and the trial court focused on the absence of acceptance of any of the PSAs by Sebco. Throughout their briefing in the trial court and in this appeal, Sweetsers have argued that an offer cannot equal a

formed contract. If the issue were whether Sweetsers and the property seller, Sebco, entered a contract, Sweetsers' contention would be correct. That, however, is not the issue, and previous cases awarding attorney fees to parties to a PSA in a dispute between the real estate brokers and a purchaser or seller have never stated such a requirement was necessary or relevant.

In support of their position that the PSAs' attorney fee provisions became part of the contract between Brokers and Sweetsers, Brokers pointed to the language in the agreements Sweetsers voluntarily signed which specify that the clause would apply " ... in any dispute relating to any aspect of this transaction or this Agreement ..." (See e.g. Paragraph 14(f) in Exhibit 1017.) Brokers pointed out that the term "Agreement" was a reference to the PSA itself and not a reference requiring any mutual acceptance of the PSA by the seller and buyer. Similarly, Brokers pointed out that the term transaction under the applicable law of agency which governed the parties would include a PSA once either of the Sweetsers had signed it. RCW 18.86.010(12). Again, nothing required acceptance by Sebco for the PSAs Sweetsers signed to become a transaction. In response, Sweetsers said nothing except that an offer does not amount to a contract.

Existing appellate authority is contrary to Sweetsers' assertion. For example, in *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn.App 834, 855-56, 942 P.2d 1072 (1997), *Review denied* 134 Wn.2d 1027, the Court of Appeals held that preparation of a PSA by a real estate licensee on behalf of a prospective purchaser made the attorney fee provision in the PSA part of the parties' contractual relationship for a purpose of awarding attorney fees. The court stated " ... the terms of the earnest money agreement and the contractual relationship created by the agreement are central to these claims, rendering them claims, 'on a contract.' "

Nothing in *Edmonds* discussed or suggested that mutual acceptance of a PSA was necessary for the attorney fee provisions to become applicable in a dispute between the brokers who prepared the PSA on the one hand and the party who signed it on the other. Sweetsers simply ignored *Edmonds* and its authority in their brief. Under the clear language in the attorney fee clause in the PSAs and prior case authority, it is clear the contract entered between Sweetsers and Brokers included the attorney fee provisions in the various PSAs.

To the extent Sweetsers' intention and understanding at the time Mr. Sweetser signed the various PSAs is relevant, it is also undisputed that Mr. Sweetser believed the PSAs were final, binding and enforceable

contract documents and he had created a specifically enforceable contract with Sebco. (See e.g. RP Corbey 37:2-7 and 47:13 – 48:16.) Thus, if the focus is on Mr. Sweetser's intent when he signed the PSAs, as distinguished from the unambiguous language in the PSAs themselves, the result is the same. When Mr. Sweetser signed the PSAs, he intended them to be operative, contractual documents creating binding obligations. He voluntarily signed those agreements and Sweetser's cite no authority for the proposition that he should be able to ignore them or should not be bound by the provisions in them. See e.g. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 64 P.3d 22 (2003); *Berschauer/Phillips Const. Co. v. Seattle School Dist. No. 1*, 124 Wn.2d 816, 826, 881 P.2d 986 (1994) (cited in Brokers' opening brief and not addressed by Sweetser's).

D. The recent decision in *Boguch v. Landover Corp.* does not change the result.

At pages 19 through 21 of their brief, Sweetser's contend that a recent case, *Boguch v. Landover Corp.*, 153 Wn.App 595, 224 P.3d 795 (2009), is dispositive in this case. Sweetser's have misconstrued the case. In *Boguch*, the court recognized at page 615 that the parties' contract provided for an award of attorney fees "to the prevailing party in an action to enforce the terms of the agreement" [Emphasis supplied]. The court

then stated "a prevailing party may recover attorney fees under a contractual fee-shifting provision such as the one at issue herein only if the party brings a 'claim on the contract,' that is, only if a party seeks to recover under a specific contractual provision" [Emphasis supplied].

In *Boguch*, the attorney fee clause at issue only purported to apply in actions to enforce the contract. The narrow scope of the clear terms in the provision mandated that the litigation had involved a claim to interpret or enforce some term of that contract. That is why, at page 615, *Boguch* required that for the clause to apply, the party seeking recovery of fees needed to demonstrate that the action constitute breach of a specific term of the contract.

Boguch does not purport to overrule cases that construe broadly worded attorney fee clauses such as the one at issue. In those cases, the breadth of the contract clause is crucial to consider. In Brokers' opening brief, numerous cases were cited for the proposition that with broadly worded attorney fee clauses, claims outside the enforcement of the contract, such as tort claims, may still come within the scope of the attorney fee provision.

For example, Brokers cited *Bloor v. Fritz*, 143 Wn.App 718, 746-47, 180 P.3d 805 (2008) in which the court interpreted an attorney fee

provision that applied to a "suit ... concerning this agreement ...". The court ruled that this provision within the parties' contract is to be interpreted and recognized with regard to the attorney fee provision "our primary goal in interpreting a contract is to ascertain the parties' intent," citing *Paradise Orchards Gen. P'ship v. Fearing*, 122 Wn.App 507, 516, 94 P.3d 755 (2004), *Review denied* 160 Wn.2d 1024. The broadly worded contract provision in that case allowed for expenses other than statutory costs to also be awarded.

Similarly, Brokers cited *Brown v. Johnson*, 109 Wn.App 56, 34 P.3d 1233 (2001) in which the court recognized that a tort action based on a contract provision covering a " ... suit concerning this Agreement, including, but not limited to claims brought pursuant to the Washington Consumer Protection Act ..." Based on that language, misrepresentation claims, which did not constitute breach of contract claims, were determined to have arisen out of the parties' agreement and come within the provision.

Sweetsers sought to distinguish these and other authorities Brokers cited by ignoring the principles found in *Paradise Orchards Gen. P'ship v. Fearing*, 122 Wn.App 507, 94 P.3d 372 (2004) (stating that the court's primary goal in interpreting the attorney fee clause at issue was to

ascertain the parties' intent and finding that language in the clause providing an award of fees and expenses indicated an intent to award more than statutory costs). Sweetsers also sought to differentiate *Brown v. Johnson*, 109 Wn.App 56, 34 P.3d 1233 (2001) by contending misrepresentation claims "were essentially contract claims and arose from the parties' contract." (Sweetsers' brief at 25.) Nothing in any of the cases supports a conclusion that the tort claims for which attorney fees were awarded constituted a breach of any specific term in any contract.

Further, if *Boguch* had really altered prior law, then subsequent cases dealing with broadly worded attorney fee provisions would have restricted application of the provisions as urged by Sweetsers. In *Borish v. Russell*, 155 Wn.App 892, 230 P.3d 646 (2010), decided after *Boguch*, the Court of Appeals ruled that with an attorney fee clause pertaining to suits "concerning this Agreement" claims outside the contract, such as application of the economic loss rule, rather than enforcement of a contract term, arose out of the contractual relationship between the parties and would therefore be encompassed within the provision. *Boguch* based its holding on the language in the specific attorney fee provision involved in that case.

In another case decided after *Boguch, Almanza v. Bowen*, 155 Wn.App 16, 230 P.3d 177 (2010), the Court of Appeals awarded attorneys fees under a PSA that terminated due to a seller's breach of statutory duties under Washington's Seller Disclosure Statement Act, RCW Chapter 64.06. That claim did not constitute a claim alleging breach of a PSA term. The Court noted "... we look to the terms of the attorney fee clause in the purchase and sale agreement." *Almanza* at 24.

E. Sweetsers' claim that statutory fee-shifting schemes cannot be altered is not supported by authority.

Sweetsers claim that courts do not allow statutory fee-shifting schemes to be altered by conflicting provisions in private contracts, citing *Walters v. A.A.A. Waterproofing, Inc.*, 151 Wn.App 316, 211 P.3d 454 (2009). In *Walters*, the court ruled that, based on the inherently unequal bargaining positions between an employer and a single employee, provisions such as an attorney fee clause that would adversely impact an employee's ability to seek wages would be unconscionable. The case did not state or suggest that statutory fee-shifting provisions invalidate all contractual attorney fee clauses.

There is no suggestion or allegation in this case that the relationship of the parties was unequal or that the bilateral attorney fee

clause in the PSAs would disadvantage either side. No facts were articulated that would support a conclusion that the attorney fee clause at issue was unconscionable. In fact, Sweetsers made no attempt to argue that the attorney fee clause was unconscionable, only that, as a matter of law, a contractual attorney fee clause cannot apply if any claims made by a party relate to statutes with an attorney fee shifting provision. None of Sweetsers' cited authority so provides.

Sweetsers also argue that *Sato v. Century 21 Ocean Shores Real Estate*, 101 Wn.2d 599, 681 P.2d 242 (1984) and *Vogt v. Seattle-First National Bank*, 117 Wn.2d 541, 817 P.2d 1364 (1991) render attorney fee clauses invalid when CPA claims are presented. The cases only hold that a successful defendant against whom CPA claims have been brought cannot recover attorney fees under the CPA. No contractual attorney fee clauses were at issue. Brokers do not seek an award of attorney fees under the CPA or any other fee-shifting statute. Brokers seek an award under the parties' contractual provisions contained in the multiple PSAs that the Sweetsers voluntarily signed and Brokers prepared and submitted.

Finally, even if Sweetsers were correct, their argument is related only to the CPA claims. They offer no argument suggesting that would carry over to apply to their common law claims or claims based on alleged

breaches of duties under Washington's Real Estate Brokerage Relationships Act, RCW Chapter 18.86. That statute has no fee-shifting provisions.

At page 23, Sweetsers again contended there was no contract between the parties and there was therefore no "so called oral contract." In the first full paragraph on page 23, Sweetsers stated "simply calling and using the services of someone (be it plumber, electrician or realtor) does not give rise to an 'oral contract' unless some agreement is orally discussed and agreed to." Sweetser cited no authority for this position and, as stated above, the position is contrary to basic principles of contract law, as implicitly recognized in cases such as *Boguch v. Landover Corp.*, 153 Wn.App at 616-17 and *Jackowski v. Borchelt*, 151 Wn.App at 14.

At pages 25 through 27, Sweetsers discussed fact patterns in some, but not all, cases discussed in Brokers' opening brief. Sweetsers sought to distinguish those cases on the basis that there were accepted PSAs or mutually executed contracts. While that factual distinction is true, it does not support Sweetsers' contention that a PSA signed by only the buyers should not be part of a contract between a broker and the buyer when the provisions of the PSA, if enforced as written, clearly apply.

The undisputed facts in this case demonstrate that Brokers selected, prepared, discussed with, witnessed execution of and presented various PSAs on behalf of Sweetsers. Sweetsers voluntarily signed the PSAs and gave them to Brokers for presentation. When he signed and delivered the PSAs, Mr. Sweetser intended that they would be operative and that they created binding duties on the part of Brokers. As Sweetsers' counsel argued in connection with the attorney fee motion, Sweetsers' claims were all about how the PSAs were handled (RP 1270:5-21). As noted above, when he signed the PSAs, Mr. Sweetser intended and believed he had created a binding contract with Sebco that could be specifically enforced. In interpreting the contract documents to give effect to Sweetsers' intent, this Court should enforce the written attorney fee provisions.

Under well-established Washington law, a party to a contract which the party has voluntarily signed cannot, in the absence of fraud, deceit or coercion be heard to repudiate the party's own signature. See e.g. *Retail Clerks Health & Welfare Trust Funds v. Shipland Supermarket, Inc.*, 96 Wn.2d 939, 944, 640 P.2d 1051 (1982).

At page 27, Sweetsers incorrectly contended they do not need to discuss cases cited for general principles of contract interpretation since

"there is simply no contract to interpret." Sweetsers concluded this section of their brief by again contending that *Boguch v. Landover Corp.* was directly on point when a party makes only statutory and tort claims and that, as a result, attorney fee clauses in contracts would never apply. As noted above, *Boguch* recognized that the relationship created between a broker and agent in these circumstances is a contractual relationship. It only purported to construe and apply the very narrowly drawn attorney fee clause involved in that case.

VI. RESPONSE TO ARGUMENT ON CROSS-APPEAL

1. Sweetsers have improperly challenged the jury's verdict.

At pages 28 through 30 of their brief, Sweetsers contended the jury's verdict was a compromise verdict requiring a new trial. In support, Sweetsers argued that declarations from three jurors, presented two days before presentment of the judgment, unconnected to any motion ever presented to the trial court, demonstrate that the verdict was a result of a compromise.

Sweetsers did not discuss the standard for review in connection with their request for a new trial. In Washington, appellate courts employ

an abuse of discretion standard in determining whether a trial court properly granted or denied a motion for a new trial. See e.g. *Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 454, 191 P.3d 879 (2008). Jury decisions are accorded considerable latitude and a jury verdict will not be lightly overturned. *Herriman v. May*, 142 Wn.App 226, 232, 174 P.3d 156 (2007).

In determining whether an appellate court will override a trial court's decision with regard to a request for a new trial, the requesting party must demonstrate that the trial court's decision to deny such a request was a manifest abuse of discretion. In requesting reconsideration of a decision denying a request for a new trial, a party may not propose new theories of the case that could have been raised before entry of the adverse decision. *Wilcox v. Lexington Eye Institute*, 130 Wn.App 234, 241, 122 P.3d 729 (2005).

The standards discussed above make it obvious that Sweetsers needed to request a new trial under CR 59 or relief from any judgment under CR 60. Sweetsers made no request for a new trial in the trial court either before or after judgment on the verdict was entered. Issues not raised before the trial court may not be raised on appeal. See e.g. *Erickson*

v. *Chase*, 156 Wn.App 151, 159, 231 P.3d 1261 (2010); *Lindblad v. Boeing Co.*, 108 Wn.App 198, 207, 31 P.3d 1 (2001).

Even if the juror declarations had not been untimely and Sweetsers had requested a new trial, the proffered juror statements would not support Sweetsers' argument. Sweetsers relied on 1958 and 1964 cases for the proposition that compromise verdicts are not allowed and require a re-trial of all issues, citing *Myers v. Smith*, 51 Wn.2d 700, 705-07, 321 P.2d 551 (1958); and *Cyrus v. Martin*, 64 Wn.2d 810, 394 P.2d 369 (1964). Both cases predate adoption of Washington's rules for Superior Court that were originally made effective March 1, 1974.

A request for a new trial is now based on the criteria in CR 59. If such a motion had been brought, the affidavits would have needed to be filed with a motion and under CR 59(c), Brokers would have had ten days after service to file opposing affidavits. However, since no motion was filed with the very late declarations, the court properly excluded them for any purpose.

Further, CR 59(a)(2) would be the most analogous provision related to Sweetsers' claim that there was a juror compromise. The trial court would have had to have found misconduct on the jury's part that showed that one or more of the jurors would have been induced to assent

to a general or special verdict that was not only other and different than his own conclusions, but also arrived at their decision by resorting to the determination by chance or lot. The declarations do not suggest this occurred.

Allegations that jurors would not listen to some jurors' views of the evidence or that some jurors went along with the position of some of the others would not establish misconduct. A juror's statement after a verdict has been rendered regarding the way in which the jurors reached their verdict cannot be used to support a motion for a new trial. Individual and collective thought processes leading to that verdict cannot provide a basis for granting a new trial. *Breckenridge v. Valley General Hospital*, 150 Wn.2d 197, 204-05, 75 P.3d 944 (2003).

Sweetsers also suggested that Juror Burley's having been a neighbor of Robert Tomlinson who was not involved in the case and was a former partner of Mr. Black's, demonstrated impermissible prejudice. Ms. Burley's status as Mr. Tomlinson's neighbor was fully disclosed and discussed in voir dire. Sweetsers made no request that she be dismissed (RP 32:19-25; 34:4-23; 86-87; and 105-06).

2. The trial court correctly gave Jury Instruction No. 11.

At pages 30 through 33, Sweetsers argued that Jury Instruction No. 11, regarding the date of mutual acceptance of the Sebco/Copeland PSA, was improper. Sweetsers contended jury instructions are to be reviewed de novo and an instruction containing an erroneous statement of law constitutes reversible error, citing *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005).

However, in order to preserve this issue on appeal, Sweetsers needed to have provided a proper basis for their objection to the instruction. *Trueax v. Ernst Home Center, Inc.*, 124 Wn.2d 334, 339, 878 P.2d 1208 (1994); *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 133-134, 606 P.2d 1214 (1980). In this case, Sweetsers did not demonstrate they presented any proper objection to Exhibit No. 11 to the trial court. A review of the portions of the record relied upon by Sweetsers demonstrates that Sweetsers did not suggest the instruction was improper on the bases they now assert.

The undisputed evidence demonstrated that the Sebco/Copeland PSA was mutually accepted when the terms of the counteroffer presented by Sebco to Copeland, as the last offeror, were accepted by Copeland as the offeree, and that signed acceptance was delivered back to Sebco. At

page 31 of their brief, Sweetsers quote the relevant language from the Sebcu/Copeland PSA

No acceptance, offer or counteroffer from the buyer is effective until a signed copy is received by the seller, the listing agent or the licensed office of the listing agent. No acceptance, offer or counteroffer from the seller is effective until a signed copy is received by the buyer, the selling licensee or the licensed office of the selling licensee. 'Mutual Acceptance' shall occur when the last counteroffer is signed by the offeree, and fully-signed counteroffer has been received by the offeror, his or her licensee, or the licensed office of the licensee.

(Paragraph 23 in Exhibits 36, 37 and 1019).

The Sebcu/Copeland PSA also specified that any document transmitted by either facsimile or email would be accepted and effective as an original. It stated "electronic delivery of documents (e.g., transmission by facsimile or email) including signed offers or counteroffers and notices shall be legally sufficient to bind the party the same as delivery of an original" (Paragraph 22.c. in Exhibits 36, 37 and 1019).

The undisputed evidence presented in the case established that Sebcu's counteroffer to Copeland was transmitted by email on October 20, 2006. The evidence further established that the accepted counteroffer was delivered to the listing agent, Earl Engle, and transmitted by Engle to the seller, Sebcu, by email on the afternoon of October 20. Further, on that

date, Sebco transmitted the mutually accepted PSA to the closing office, which opened escrow by the end of the day on October 20, 2006 (RP 401:14 – 407:2; 852:11 – 855:21).

In an attempt to claim there was some issue in this regard, Sweetsers misrepresented the record on page 32 of their brief. Sweetsers contended "Mr. Fountain testified that he did not do it for Copeland until the next Monday, October 23, 2006," citing RP 496:21 – 497:15. A review of the record demonstrates that Mr. Fountain's testimony was otherwise. Mr. Fountain agreed in his testimony that the best record available to establish the date of mutual acceptance would be contemporaneous email. Upon reviewing Exhibits 1019 and 1065, Mr. Fountain agreed that the counteroffer was received by him on October 20 and signed and returned on the same date. Mr. Fountain agreed the contemporaneous emails demonstrated mutual acceptance on October 20 and that this record was far more accurate than his memory (RP 508:17 – 513:4).

Similarly, Sweetsers misrepresented the testimony of Ms. Anne Betow, who was not the listing agent representing Sebco or the agent representing the successful purchaser, Copeland. Sweetsers claimed Ms. Betow testified in deposition that she thought mutual acceptance occurred

on Monday or Tuesday citing RP Corbey 204:16 – 205:11. What Ms. Betow actually testified to in her deposition, which was from memory, was that "it's somewhere in one of the emails. I will let you know that. But I think it was Monday or Tuesday, I can't remember." In court, she confirmed that her deposition testimony had been provided from memory and that the written records would provide the accurate date when mutual acceptance occurred (RP Corbey 205:16 – 206:22).

In an effort to suggest the instruction was improper, Sweetsers argued for the first time on appeal that the counteroffer provisions needed to be signed and claimed that in this case, no fully signed counteroffer with all necessary signatures and dates had been delivered or received by anyone. Sweetsers cite no authority for this position and provide no reference to the record, nor do they present an argument that signatures beyond those included in the PSA, with counteroffer changes having been initialed (Exhibits 36, 37 and 1019) were necessary. Nothing in the PSAs supported Sweetsers' claim that counter-offered initials also needed to be dated in order to be valid and Sweetsers have cited no authority for that proposition.

Finally, Sweetsers argued that the PSA had to be made subject to First American Title Company's first right of refusal to be valid, relying on

Bennett Veneer Factors, Inc. v. Brewer, 73 Wn.2d 849, 856, 441 P.2d 128 (1968). *Bennett Veneer* involved a claim between the seller and buyer, not a collateral attack by a stranger to the contract.

First American Title was never a party in this case, provided no evidence in the trial, and did not suggest that it had been wronged. Rather, Sweetsers, who are not parties to the Sebco to Copeland Purchase and Sale Agreement, attempted to interject obligations on Sebco that were not supported by authority.

The undisputed evidence from Sebco demonstrated that Sebco's President had discussed the first right of refusal with First American prior to entering the Sebco/Copeland PSA and First American had indicated it was not interested in purchasing the property and would confirm that decision in writing when requested by Sebco (CP 905:12 – 908:14). At the time the Sebco/Copeland PSA was entered, that issue had already been verbally resolved between the two parties to the first right of refusal agreement. Sweetsers cite no authority supporting a contention that they, as strangers to the contract, had any right to raise any contrary assertion.

Instruction 11 was made necessary by Sweetsers' position and testimony. Sweetsers argued at various points that not only did a counteroffer from Sebco need to be initialed by Copeland, those initials

needed to be dated (See, e.g. RP Corbey 48:15-17 and 222:2 – 223:13; RP 126:4-7; 294:5 – 295:24; 296:25 – 298:14). The assertion was contrary to the language in the Sebco/Copeland PSA and all evidence confirmed mutual acceptance of the Sebco/Copeland PSA occurred October 20, 2006.

3. The court properly gave Instruction No. 12.

Sweetsers argue that Instruction No. 12 should not have been given. That instruction advised the jury that the real estate statute of frauds does not apply to first rights of refusal, a first right of refusal can be waived orally, and the first right of refusal in the lease between Sebco, Inc. and First American Title was not assignable.

The authority presented to the trial court supporting Jury Instruction No. 12 was *Old National Bank of Washington v. Arneson*, 54 Wn.App 717, 721-22, 776 P.2d 145 (1989). At trial, Sweetsers' position was that *Old National Bank of Washington* applied, but that the lease contract language should control.

Sweetsers now contend on appeal that the case relied upon by the Court of Appeals in *Old National Bank of Washington v. Arneson, Robroy Land Co. v. Prather*, 95 Wn.2d 66, 70-71, 622 P.2d 367 (1980), "may not

be good law," relying on *South Kitsap Family Worship Center v. Weir*, 135 Wn.App 900, 909, 146 P.3d 935 (2006). As noted above, a party that fails to present an argument at trial is precluded from raising the issue on appeal. *Trueax v. Ernst Home Center*, 124 Wn.2d 334, 878 P.2d 1208 (1994); *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 606 P.2d 1214 (1980).

Even if Sweetsers were allowed to make the argument, *South Kitsap Family Worship Center* did not purport to overrule *Robroy* or *Old National Bank*, nor did *South Kitsap Family Worship Center*, *Manufactured Housing Communities v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000).

Sweetsers have misread both cases. In *Manufactured Housing Communities*, the Supreme Court did not rule that a first right of refusal was a real property interest in the hands of the potential buyer. Rather, the Supreme Court held that a property owner's right to sell property to whomever it desired was a valuable property right. The Court concluded that a statute imposing an obligation on a manufactured park owner to grant tenants a first right of refusal constituted a taking for due process purposes. The Supreme Court did not suggest a first right of refusal in the hands of a potential buyer was a real property interest.

Similarly, in *South Kitsap Family Worship Center*, the Court of Appeals discussed manufactured communities, recognizing that the Supreme Court in *Manufactured Housing Communities* only ruled that a first right of refusal interferes with an owner's right to dispose of their property as they choose. *South Kitsap Family Worship Center* recognized that a right of first refusal is not a property interest from the perspective of the holder of the right.

Neither *Manufactured Housing Communities* or *South Kitsap Family Worship Center* purported to overrule *Robroy*. Sweetsers did not argue in the trial court or in this appeal that *Robroy* has been or should be overruled.

Sweetsers next argue that the right of first refusal had to be waived in writing. Sweetsers cited no authority for this proposition in their brief and cited no authority for this proposition in the trial court. In Washington, parties may always waive or modify written agreements. See e.g. *Reynolds Metal Co. v. Electric Smith Const. & Equip. Co.*, 4 Wn.App 695, 699-700, 483 P.2d 880 (1971). This is especially true in a case such as this where the requirement of a writing was for the benefit of a non-party, First American Title, from whom no testimony was provided at trial. The undisputed evidence at trial was that the requirement of a

writing was waived by First American Title before the Purchase and Sale Agreement from Sebco to Copeland was entered. Sebco's testimony in this regard was undisputed. Washington law is clear that First American Title, as the party to be benefited by the provision, had the absolute right to waive any writing requirement. *Swensen v. Lowe*, 5 Wn.App 186, 188-189, 486 P.2d 1120 (1971).

4. Instruction No. 12 was not defective or misleading.

Sweetsers argued that Jury Instruction No. 12 "was a hastily put together instruction TBC wanted the Court to give to undermine Sweetser's [sic] case." Sweetsers also claim Instruction 12 used terms such as "statute of frauds," "waived" and "assignable" without defining them. Mr. Sweetser testified regarding the nature of the statute of frauds and the right that he would supposedly have to acquire an assignment (RP 537:5-11; 583:2 – 584:22). In any event, Sweetsers presented no objection to Instruction No. 12 on this basis and cannot pursue it in this appeal. *Erickson v. Chase* and *Lindblad v. Boeing Co.*, at 207.

Further, Sweetsers contended that that first right of refusal may well have been assignable, given that the lease generally allowed assignment of First American's interest "with Sebco's approval ..."

[Emphasis supplied.] There is no suggestion Sebco would have approved assignment of the first right of refusal from First American to Sweetsers. Doing so would have forced Sebco to deal with Sweetsers for the purchase of the Property when Sebco had obviously chosen to deal with Copeland. There was simply no evidence that would have permitted the trial court or the jury to speculate that Sweetsers would have had any ability to obtain consent for such an assignment. To the extent evidence was provided on this point, it is very unlikely Sebco would have assisted Sweetsers in displacing Copeland as the buyer (CP 875:7 – 876:5).

Beginning with the first paragraph on page 39, Sweetsers argued that the only relevance regarding the first right of refusal was whether it was a material fact requiring disclosure by TBC to Sweetsers. This is untrue. Incorrect information on these items was first presented by Sweetsers' counsel in his opening statement (RP 126:4-19 and 128:6-9). In trial testimony, Mr. Sweetser claimed that if he had known of the right of first refusal, it would have given him the opportunity to go to First American Title, the lessee, to attempt to purchase the right of first refusal in order to obtain the building (RP Corbey 66:19-23 and RP 583:4 – 584:22). Sweetsers also attempted to ask their expert witness, Mr. Hager, whether a first right of refusal could be transferred (RP 685:24 – 686:4).

It was Sweetsers' incorrect legal assertions in their opening statement and in trial testimony that made Instruction 12 necessary.

Sweetsers did not suggest it was improper for the trial court to correctly instruct the jurors on the law. Where facts are undisputed and only one reasonable inference can be drawn therefrom, the trial court properly directs a jury with regard to the law on that issue. See *Van Cleve v. Betts*, 16 Wn.App 748, 751, 559 P.2d 1006 (1977).

5. The trial court did not err in limiting the length of trial or the presentation of evidence.

Sweetsers argued that the trial court erred in restricting the length of trial and forcing the parties to present their cases efficiently. In the agreed Trial Management Joint Report, counsel for both parties agreed the case should take 11 court days to try. Sweetsers agree the court had 8 days available; and no party objected to proceeding with trial, recognizing that the case needed to be resolved within that time frame. In allocating the time among the parties, the trial court exercised discretion to afford each side an opportunity to present their case.

Contrary to Sweetsers' inferences, the trial court had broad authority to limit the amount of testimony it would accept. *Residents*

Opposed to Kittitas Turbines v. State, 165 Wn.2d 275, 300-302, 197 P.3d 1153 (2008). Factors in limiting evidence include whether additional evidence would tend to distract or confuse jurors, waste time, or provide only cumulative evidence. *Christensen v. Munsen*, 123 Wn.2d 234, 241-242, 867 P.2d 234 (1994); *Roberts v. Atlantic Richfield Company*, 88 Wn.2d 887, 898, 568 P.2d 764 (1977). The trial court's discretion includes a decision not to permit new testimony in rebuttal. *Kremer v. Audette*, 35 Wn.App 643, 648, 668 P.2 1315 (1983). Decisions regarding the introduction of testimony and the limiting of such testimony are addressed to the trial court's discretion and those decisions will not be reversed absent a showing of an abuse of discretion and resulting prejudice. *In re Welfare of Ott*, 37 Wn.App 234, 239-240, 679 P.2d 372 (1984).

Applying the above factors to this case, there is no question that the trial court was well within its discretion to limit the trial as it did. As noted by Sweetsers, there was a certain amount of trial time available. All parties elected to go forward, no party objected to the rulings limiting the evidence or the time for presenting each party's case and the parties had a fair opportunity to present their position.

Further, Sweetsers were not prejudiced by those rulings. Sweetsers' only argument with regard to prejudice was that they would

like to have presented more evidence regarding the public interest element of their Consumer Protection claims. In their verdict, the jury determined that not only was there no Consumer Protection Act violation, the jury also determined that nothing related to the Consumer Protection Act claims proximately caused the Sweetsers any injury or damages (CP 415–416). Had Sweetsers more fully developed the public interest element of their CPA claim, there is no reason the decision on proximate causation would have been different. There was simply no prejudice.

Finally, Sweetsers did not object to the limitations imposed by the trial court. The only thing Sweetsers attempted to do was to reopen their case to introduce additional evidence that could have been introduced and discussed through witnesses they called in trial. Whether through oversight or bad time management, Sweetsers' problems in this regard were self-inflicted. The trial court's decision not to allow them to reopen their case after they had rested was neither an abuse of discretion nor is there any demonstration that it resulted in prejudice. Absent a showing of both an abuse of discretion and prejudice, Sweetsers are not entitled to relief on this issue. *In re Welfare of Ott*, 37 Wn.App at 239-40.

6. Response to Sweetsers' request for attorneys' fees and Brokers' renewed request for attorneys' fees.

Sweetsers claim they are entitled to attorney fees based on RAP 18.9(a). Sweetsers' arguments in this regard are unsupported by any relevant evidence or analysis. Sweetsers have not remotely demonstrated that the Brokers' request for attorney fees was not well-founded. RAP 18.9 specifies that attorneys' fees or sanctions would only be recoverable upon a showing that the appeal was frivolous. An appeal is only frivolous if " ... there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there was no reasonable possibility of reversal." *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 535, 29 P.3d 1154 (2003); *Kim v. Moffett*, 156 Wn.App 689, 706, 234 P.3d 279 (2010). Sweetsers have hardly demonstrated that this was the case. In fact, if principals of contract law are applied to the unique facts presented in this case, the trial court's decision was clearly wrong and reasonable attorney fees should be awarded to Brokers based on the parties' contract.

Brokers renew their request for an award of reasonable attorney fees in connection with their appeal, as well as Sweetsers' cross-appeal. All issues presented in the appeal and the cross-appeal are related to the

PSAs prepared and submitted by the Brokers on Sweetsers' behalf and signed multiple times by Mr. Sweetser.

VII. CONCLUSION

Sweetsers had the opportunity to present their claims to a jury and the jury determined that they failed to establish their case. No bases exist for reversing the decision of the jury. When Sweetsers initiated and pursued this action, they were bound by a contract that included written attorney fees provisions that applied when Brokers successfully defended against Sweetsers. That has occurred and the Brokers should be awarded their attorney fees at trial on their appeal and in connection with Sweetsers' cross-appeal.

RESPECTFULLY SUBMITTED this 4th day of October 2010.

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